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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-6521

MONICA ALDINGER,

Petitioner,

v.

MERTON HOWARD, individually and in his capacity as Treasurer of Spokane County, and

SPOKANE COUNTY, a public corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The respondent, SPOKANE COUNTY, respectfully prays that the petition for a writ of certiorari in the above-entitled matter be denied.

STATEMENT OF THE CASE

The petitioner was terminated from her position in the Spokane County Treasurer's Office in 1971, as she alleges. However, it was not until the Second Amended Complaint was filed some two years later that any assertion or question of pendent

jurisdiction was made by petitioner.

The sole reference to pendent jurisdiction made by petitioner in her second amended complaint was the conclusory statement that: "Further, the Federal District Court may exercise Pendant [sic] Jurisdiction over the state law claims against the parties as more fully set forth herein."

No state claim whatsoever against the respondent County was stated upon which any relief could be granted. In the paragraph entitled "Parties", petitioner merely stated: "Defendant Spokane County is a public corporation and an action may be maintained against it authorized by R.C.W. 4.08.120."

The Revised Code of Washington (R.C.W.), section 4.08.120 provides as follows:

> "Actions against public corporations. An action may be maintained against a county or other of the public corporations mentioned or described in RCW 4.08.110, either upon a contract made by such county, or other public corporation in its corporate character and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation."

REASONS FOR DENYING THE WRIT

It is respectfully submitted by respondent Spokane County that the Supreme Court does not have jurisdiction over this petition due to its mootness.

Even assuming for the sake of argument that petitioner's second amended complaint stated a state law claim upon which relief can be granted, petitioner has failed to comply with the state law regarding the conditions precedent to the maintenance of an action for damages against a county.

R.C.W. 36.45.010 provides as follows:

> "Time for filing. All claims for damages against any county must be presented before the board of commissioners and filed with the clerk thereof within one hundred and twenty days from the date that the damage occurred or the injury was sustained."

R.C.W. 36.45.030, which is entitled "Time for Commencement of Action," provides as follows:

> "No action shall be maintained on any claim for damages until it has been presented to the board of county commissioners and sixty days have elapsed after such presentation but such action must be commenced within three months after the sixty days have elapsed or within three months after the board has given the claimant notice by registered mail of disallowance in whole or in part of the claim for damages, whichever is longer."

The Washington law concerning the failure to file a timely claim against the County as a bar to maintenance of an action against the County is well settled. The Washington court has repeatedly held that R.C.W. 36.45.030 makes the filing of a claim with the Board of County Commissioners a procedural condition precedent to the maintenance of an action. Although it has been held that it is not necessary to plead the filing of such a claim, the defendant may raise the objection that no claim was filed, whereupon the burden is on the plaintiff to show he has complied with the statute. Goodner v. Chicago Milwaukee, etc. R. Co., 61 Wn.2d 12, 27,377 P.2d 231 (1962). See also Thorgaard Plumbing & Heating Co., Inc. v. County of King, 71 Wn.2d 126, 426 P.2d 828 (1967). Cook v. Clallam County, 27 Wn.2d 793, 180 P. 2d 573 (1947); and cases cited therein.

The petitioner here has simply never filed the requisite claim for damages with the Board of County Commissioners. Therefore the District Court will have no alternative under applicable state law but to dismiss the complaint against the respondent County even if this Court were to hold that federal courts have the power to join a pendent state claim in a proper case.

In spite of petitioner's attractively framed theoretical question, the question nevertheless remains precisely that as far as this petitioner is concerned -- a theoretical question which cannot affect this particular litigant's rights or legal relations with this respondent.

This court very recently had the occasion to reiterate the familiar and long-recognized proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in this case before them. North Carolina v. Rice, 404 U.S. 244, 246, 30 L.Ed. 2d 413, 92 S.Ct. 402 (1971)." DeFunis v. Odegaard, 416 U.S. 312, 316, 40 L.Ed. 2d 164, 94 S.Ct. 1704 (1974).

The court in DeFunis went on to state:

> ". . . . The inability of the federal judiciary 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' Liner v. Jafco, Inc. 375 301, 306 n 3, 11 L.Ed. 2d 347, 84 S.Ct. 391 (1964); see also Powell v. McCormack, 395 US 486, 496 n 7, 23 L.Ed 2d 491, 89 S.Ct. 1944 (1969); Sibron v. New York, 392 US 40, 50 n 8, 20 L.Ed 2d 917, 88 S.Ct. 1889 (1968). Although as a matter of Washington state law it appears that this case would be saved from mootness by 'the great public interest in the continuing issues raised by this appeal,' 82 Wash. 2d 11, 23 n 6, 507 P.2d 1169, 1177 N 6 (1973), the fact remains that under Art. III '[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction.' North Carolina v. Rice, supra, at 246, 30 L.Ed. 2d 413." Ibid

The court in Powell v. McCormack, 395 U.S. 486, 23 L.Ed. 2d 491, 89 S.Ct. 1944 (1969) defined a moot case as follows:

> "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. See E. Borchard, Declaratory Judgments 35-37 (2d ed. (1941)."

Respondent submits that since petitioner herein has failed to perform a mandatory condition precedent to the maintenance of its purported state law claim, the decision of the question presented cannot affect the petitioner's rights in the instant matter. Petitioner lacks a legally cognizable interest in the outcome of this matter.

CONCLUSION

For these reasons the petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

DONALD C. BROCKETT
GARALD A. GESINGER

Attorneys for Respondents

APPENDIX

FILED IN THE
U. S. DISTRICT COURT
Eastern District of Washington
AUG 22 1973
J. R. FALLQUIST, Clerk
Deputy

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

MONICA ALDINGER, a single woman,
Plaintiff,

vs.

MERTON L. HOWARD, et al.,
Defendants.

No. 3556

SECOND AMENDED COMPLAINT

I. NATURE OF CLAIM

1. This is an action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. §1983 to redress violations of rights secured to plaintiff by the First, Ninth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks a declaratory judgment, pursuant to 28 U.S.C. §§2201 and 2202, that her dismissal from employment in the office of the County Treasurer of Spokane County, Washington, violated her constitutionally protected right to privacy and to freedom of expression and association, her right to equal protection of the laws, and her right to procedural and substantive due process. Inasmuch as plaintiff's dismissal was authorized by §36.16.070 of the Revised Code of Washington, plaintiff seeks a declaratory judgment that this statute, on its face and as so applied, is similarly unconstitutional. Plaintiff further seeks a temporary restraining order and, upon hearing before a three-judge district court, pursuant to 28 U.S.C. §§2281 and 2284, preliminary and permanent injunction restraining defendants from dismissing her from her employment, and restraining the operation of §36.16.070 of the Revised Code of Washington inasmuch as it authorizes such dismissal.

II. JURISDICTION

2. Jurisdiction lies under 28 U.S.C. §1331(a) and §§1343 (3) and (4). The amount in controversy, exclusive of interests and costs, exceeds $10,000. Further, the Federal District Court may exercise Pendant Jurisdiction over the state law claims against the parties as more fully set forth herein.

III. THREE-JUDGE DISTRICT COURT

3. The defendant County Treasurer's dismissal of plaintiff from her employment was done under the asserted authority of

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§36.16.070 of the Revised Code of Washington, which provided for dismissal of employment by a county officer "at [his] pleasure." Plaintiff seeks preliminary and permanent injunction restraining her dismissal, and restraining the operation of §36.16.070 inasmuch as it authorizes such dismissal on the grounds that the dismissal and the statute, on its face and as so applied, violates plaintiff's constitutional rights. 28 U.S.C. §§2281 and 2284 require that the action be heard and decided by a three-judge district court.

IV. PARTIES

4. Plaintiff is a citizen of the United States and resided in Spokane, Washington, at the time of her dismissal from employment with the County Treasurer.

5. Defendant Merton L. Howard is the County Treasurer of the defendant Spokane County, Washington, and at all times herein was acting both individually and in his official capacity as the treasurer and agent of defendant Spokane County. Plaintiff is ignorant as to the true name of the named Jane Doe, who, upon information and belief, is the wife of the defendant Merton L. Howard. Because of lack of knowledge of the true name of the aforementioned defendant Jane Doe, this defendant is sued herein under said name as a fictitious name and plaintiff prays that when the true name of this defendant is ascertained it may be inserted herein, and in all subsequent proceedings in said action, and that the said action may then proceed against her under her true name.

6. Defendant Spokane County is a public corporation and an action may be maintained against it authorized by RCW 4.08.120.

7. Defendants William O. Allen, E. W. (Bill) Parsons and Ray W. Christensen are County Commissioners of the defendant Spokane County, Washington.

V. STATEMENT OF CLAIM

8. Plaintiff was employed in a filing and recording position in the Spokane County Treasurer's Office by defendant Merton L. Howard on July 1, 1971. Plaintiff was employed at a salary of $98.00 per week.

9. On or about September 1, 1971, plaintiff was informed by defendant Howard that she would be dismissed as an employee of Spokane County, Washington.

10. In a letter dated August 30, 1971, defendant Howard informed plaintiff that, though her performance on the job had been "excellent," she was to be dismissed as an employee of Spokane County because she was allegedly "living with [her] boy friend." On September 15, 1971, plaintiff was dismissed as an employee of Spokane County, Washington.

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11. Plaintiff has performed her duties as a filer and recorder for Spokane County, Washington, diligently and her dismissal was based solely on the allegation that she was living with her boy friend.

12. No hearing on the issues raised by the dismissal of plaintiff was held prior to the dismissal, though plaintiff's attorney requested such a hearing.

13. No hearing on the issues raised by the dismissal of plaintiff has been held to date, though plaintiff's attorney has requested such a hearing.

14. The County Treasurer's dismissal of plaintiff was done under the asserted authority of §36.16.070 of the Revised Code of Washington.

15. Plaintiff has no adequate remedy at law. The action of the defendants is causing, and will continue to cause, irreparable injury to plaintiff.

VI. FIRST CAUSE OF ACTION

16. Defendant's failure to notify plaintiff of the charges against her and to conduct a hearing prior to plaintiff's dismissal and their continued failure to provide such notice or hearing violates plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal in this matter was authorized by §36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, has similarly violated plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

VII. SECOND CAUSE OF ACTION

17. Defendants' dismissal of plaintiff from public employment violates plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution in that the reason for the dismissal is arbitrary, vague and unreasonable. Inasmuch as plaintiff's dismissal was authorized by §36.16.070 of the Revised Cose of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights' under the due process clause of the Fourteenth Amendment to the United States Constitution.

VIII. THIRD CAUSE OF ACTION

18. Defendants' dismissal of plaintiff from public employment violates her right to equal protection of the laws under

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the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by §36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

IX. FOURTH CAUSE OF ACTION

19. Defendants' dismissal of plaintiff from public employment violates plaintiff's right to privacy as protected by the First and Ninth Amendments and the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by §36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's constitutionally protected right to privacy.

X. FIFTH CAUSE OF ACTION

20. Defendants' dismissal of plaintiff from public employment violates plaintiff's rights to freedom of expression and association as protected by the First Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by §36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution.

XI. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that:

A. A three-judge district court be convened to hear and decide this action, in accordance with 28 U.S.C. §§2281 and 2284;

B. Pending the hearing and disposition of this action by a three-judge district court, a temporary restraining order be granted, pursuant to 28 U.S.C. §2284 (3), restraining defendants from dismissing plaintiff and permitting her to resume her employment;

C. Upon hearing before a three-judge district court:

(1) Preliminary and permanent injunctions be issued restraining defendants from violating plaintiff's constitutional rights by dismissing her from her employment, as alleged above, and restraining the operation of §36.16.070 of the Revised Code of Washington inasmuch as it authorizes such dismissal;

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(2) A declaratory judgment be entered declaring th County Treasurer's dismissal of plaintiff, and §36.16.070 of the Revised Code of Washington, inasmuch as it authorizes such dismissal, on its face and as so applied, to be violative of plaintiff's rights under the United States Constitution, as alleged above;

(3) Plaintiff be awarded damages for her salary loss and other injuries suffered as a result of the unlawful acts alleged above;

(4) That plaintiff be awarded the costs and disbursements of this action;

(5) Plaintiff be granted such other and further relief as the Court feels just and proper.

DATED THIS 15th DAY OF AUGUST, 1973.

Respectfully submitted,
SPOKANE COUNTY LEGAL SERVICES

BY: Norman Rosenberg
NORMAN R. ROSENBERG,
Attorney for plaintiff

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